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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**
15

16 IN RE HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS
19

Master Docket No. 11-CV-2509 LHK

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' ADMINISTRATIVE
MOTION TO ENFORCE DECEMBER
18, 2013 CASE MANAGEMENT
ORDER AND LOCAL RULE 7-11**

20 Date: N/A
21 Time: N/A
Courtroom: 8, 4th Floor
22 Judge: The Honorable Lucy H. Koh
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1 This Court's December 18, 2013 Case Management Order provided the following
2 limitation regarding *Daubert* motions: "The parties' *Daubert* motions shall be limited to a total
3 of 25 pages per side, with oppositions not to exceed a total of 25 pages per side." (Dkt. 547 at 2.)
4 Plaintiffs argue that Defendants violated this limitation because, in addition to filing two *Daubert*
5 motions (which complied with the 25-page limit), Defendants also filed a Motion to Strike the
6 Improper Rebuttal Testimony in Dr. Leamer's Reply Expert Report or, in the Alternative, for
7 Leave to Submit a Reply Report of Dr. Stiroh. Plaintiffs' argument fails for one simple reason:
8 Defendants' Motion to Strike is not a *Daubert* motion.

9 A motion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993),
10 seeks to exclude expert opinion on the ground that it fails the standard for admissibility under
11 Federal Rule of Evidence 702. Defendants filed two motions based on *Daubert*: one to exclude
12 the testimony of Dr. Leamer and another to exclude the testimony of Dr. Marx. Both motions
13 expressly rely on and cite to *Daubert*. See Defendants' Joint Motion to Exclude the Expert
14 Testimony of Edward E. Leamer, Ph.D., at i (describing the issue to be decided as: "Whether Dr.
15 Leamer's expert testimony should be excluded in its entirety because the statistical analysis
16 essential to his opinions regarding impact and damages fails to meet the standards for reliable,
17 relevant, and admissible testimony required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
18 509 U.S. 579 (1993), and Federal Rule of Evidence 702."); Defendants' Joint Motion to Exclude
19 the Expert Testimony of Matthew Marx, Ph.D., at iv (describing the issue to be decided as:
20 "Whether Dr. Marx's proposed expert testimony should be excluded in its entirety because it fails
21 to satisfy the standards for reliable, relevant, and admissible testimony required by *Daubert v.*
22 *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.").

23 By contrast, Defendants' Motion to Strike is not based on *Daubert*. Indeed, it does not
24 even mention *Daubert*, much less rely on it (other than to reference that it was being filed
25 concurrently with a separate *Daubert* motion). This is because Defendants' Motion to Strike
26 does not seek to exclude Dr. Leamer's testimony on the ground that it fails to meet the standards
27 for admissibility of expert testimony (under *Daubert*). Instead, the Motion to Strike argues that
28 regardless of whether Dr. Leamer's expert opinions would otherwise be admissible, the new

1 material included in his rebuttal report should be excluded under Federal Rules of Civil Procedure
 2 26 and 37 because it constitutes improper rebuttal. *See* Motion to Strike (requesting, in notice of
 3 motion, “an order striking portions of Dr. Leamer’s expert reply report as improper rebuttal or, in
 4 the alternative, for leave to submit a reply report from their expert, Dr. Stiroh, pursuant to Federal
 5 Rules of Civil Procedure 26 and 37”). The basis for the motion is that after Dr. Leamer submitted
 6 a bare-bones 21-page initial expert report, he submitted a 78-page rebuttal report only 16 days
 7 after Defendants filed their expert reports. The rebuttal report is not limited to “true rebuttal,” as
 8 the parties agreed and the Court required. Declaration of Christina Brown in Support of
 9 Defendants’ Motion to Strike, Ex. 1 (Mar. 13, 2013 e-mail), Ex. 2 (Apr. 8, 2013 Hr. Tr. at 19:6-
 10 9). Instead, it contains entirely new analyses that should have been part of his original report.
 11 The rebuttal report is classic sand-bagging and violates Federal Rules of Civil Procedure 26 and
 12 37. After Dr. Leamer filed his reply report, Defendants asked Plaintiffs in writing to withdraw
 13 that report or, in the alternative, to allow Defendants to submit a reply report from Dr. Stiroh
 14 responding to Dr. Leamer’s new analysis. Plaintiffs refused. Defendants had no choice but to
 15 move to strike the improper new analyses.

16 In short, Defendants’ motion to strike is not based on *Daubert* and has nothing to do with
 17 *Daubert*. Plaintiffs’ Motion to Enforce the Court’s December 18, 2013 Case Management Order
 18 should be denied.¹

19 Dated: February 14, 2014

By: /s/ Michael F. Tubach
 Michael F. Tubach

27 ¹ Because the Motion to Strike did not contravene the Court’s December 18, 2013 Case
 28 Management Order, Defendants were not required to file an administrative motion under Local
 Rule 7-11 to seek permission to file it.

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19 **ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in
20 the filing of this document has been obtained from all signatories.